



U.S. Department
of Transportation

Research and
Special Programs
Administration

Office of the
Chief Counsel

400 Seventh St. S.W.
Washington D.C. 20590

APR 23 1991

Ms. Susan H. Denny
Director
Transportation Management Program
Office of Technology Development
Department of Energy
Washington, DC 20585

Dear Ms. Denny:

I am responding to your March 25 request for a definition of "public highway" in the context of the Hazardous Materials Transportation Act (HMTA), 49 App. U.S.C. 1801 et seq., and the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, issued under the HMTA. Because the applicability of the HMTA depends upon the existence of "transportation in commerce" (49 App. U.S.C. 1801, 1803, 1804), I will discuss the issues in terms of whether there is transportation in commerce rather than whether there is transportation on public highways.

On November 16, 1990, the HMTA was amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Public Law 101-615. Section 3 of the HMTUSA added a definition of "person" to 49 App. U.S.C. 1802 that makes it clear that government agencies offering hazardous materials for transportation in commerce or transporting hazardous materials in furtherance of a commercial enterprise are subject to the HMTA. It states:

The term 'person' means . . . government, Indian tribe, or agency or instrumentality of any government or Indian tribe when it offers hazardous materials in furtherance of a commercial enterprise, but such term does not include (a) the United States Postal Service, or (B) for the purposes of sections 110 and 111 [penalties and specific relief, respectively] of this title, any agency or instrumentality of the Federal Government.

Also, Section 20 of the HMTUSA added 49 U.S.C. App. 1818 to provide that the HMTA applies to contractors with, among others, the Federal Government. It states:

Any person who, under contract with any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal government, transports, or causes to be transported or shipped, a hazardous material . . . shall be subject to and comply with all provisions of this title, all orders and regulations issued under this title, and all other substantive and procedural requirements of Federal, State and local governments and Indian tribes (except any such requirements that have been preempted by this title or any other Federal law), in the same manner and to the same extent as any person engaged in such activities that are in or affect commerce is subject to such provisions, orders, regulations, and requirements.

Therefore, the Department of Energy (DOE) is required to comply with the HMR when it offers hazardous materials for transportation or transports them in commerce. DOE, however, is not required to comply with the HMR when it offers or transports hazardous materials in a Government vehicle because those DOE activities are presumed to be for a governmental purpose and thus not in commerce.

DOE's contractors, however, must comply with the HMR even when the transportation is in a Government vehicle -- unless the transportation is not in commerce (a prerequisite to the applicability of the HMTA and the HMR).

Transportation on (across or along) roads outside of Government properties generally is transportation in commerce. Transportation on Government properties requires close analysis to determine whether it is in commerce. If a road is used by members of the general public (including dependents of Government employees) without their having to gain access through a controlled access point, transportation on (across or along) that road is in commerce. On the other hand, if access to a road is controlled at all times through the use of gates and guards, transportation on that road is not in commerce.

One other means of preventing hazardous materials transportation on Government property from being in commerce is to temporarily block access to the section of the road being crossed or used for that transportation. The road would have to be blocked by persons having the legal authority to do so, and public access to the involved section of road would have to be effectively precluded.

The following discussion applies these general principles to the situations described in your letter.

Example 1: Road A is located on DOE-owned property and is maintained by DOE. Speed enforcement is by a DOE contractor. The road has unrestricted public access, but there are signs stating that persons are entering DOE property. Analysis: Road A has unrestricted public access, and, therefore, transportation on or across it is subject to the HMR.

Example 2: Road B traverses a DOE site, but is maintained by the State. Speed enforcement is by the State. The DOE cannot unilaterally block the road. There is unrestricted public access, except for times when DOE/State Police physically block public access in order to make special shipments. Analysis: Because there is unrestricted public access to Road B, transportation on or across it is subject to the HMR. However, effective blocking of public access (as described above) by DOE or State officials would avoid application of the HMR.

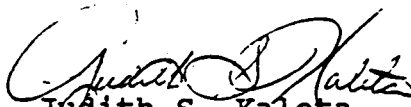
Example 3: Road C connects two DOE sites, is owned by the city and is maintained by DOE under a legal agreement. Speed enforcement is by the city. The public has unrestricted access. Analysis: Road C is not on Government property; thus, the HMR would apply.

Example 4: Road D is on DOE-owned property and is maintained by DOE. Speed enforcement is by a DOE contractor. The road is posted with a sign restricting usage to those on official government business, but there are no physical barriers. Analysis: Because there is public access to Road D, the HMR would apply there. This result could be changed either by effectively blocking public access or by controlling public use at all times through the use of gates and guards.

As indicated above, transporting a hazardous material across a road or doing so along a road both are subject to the HMR unless the section of the road involved is removed from commerce by one of the above-described actions.

I trust that this information will be useful to you in providing guidance to your operating contractors. Please advise me if additional information or clarification is desired.

Sincerely,


Judith S. Kaleta
Chief Counsel

March 25, 1991

Ms. Judith S. Kaleta, Esq.
Chief Counsel
Research and Special Programs Administration
U.S. Department of Transportation
Washington D.C. 20590

SUBJECT: Request for Formal Interpretation of Definition of Public Highway

Dear Ms. Kaleta:

The Department of Energy (DOE) is developing policy for its transportation operations and needs clarification concerning a number of roads at various sites. We need to be certain which roads are subject to the provisions of the Hazardous Materials Transportation (HMT) regulations. It is our understanding that the Department of Transportation (DOT) regulations are applicable for hazardous materials moved in commerce, on public highways. How does DOT define a public highway? Specifically, in determining the applicability of the DOT regulations, does DOT look at jurisdiction and control over the highway, access to that highway by the general public, or a combination of these?

To illustrate possible application of these questions to roads at DOE sites, the following roads are described:

- Road A: The road is located on DOE-owned property, and is maintained by DOE. Speed enforcement is by a DOE contractor. The road has unrestricted public access, but there are signs stating they are entering DOE property. Is this considered a public highway by DOT? Is DOE or its contractors subject to the DOT regulations when transporting hazardous materials on this road?
- Road B: The road traverses a DOE site, but is maintained by the State. Speed enforcement is by the State. The DOE cannot unilaterally block the road. There is unrestricted public access, except for times when DOE/State Police physically blocks public access in order to make special shipments. Is the portion of the road on DOE property considered a public highway by DOT? Does restricting public access change the status of the highway in any way? Is DOE or its contractors subject to the DOT regulations when making shipments on this road without restricting public access? Are they subject to the regulations when the public access is restricted?
- Road C: The road connects two DOE sites, is owned by the city, but is maintained by DOE, under legal agreement. Speed enforcement is by the city. The public has unrestricted access. For a special

shipment of hazardous materials, DOE, with the city's concurrence, will block off the road while the shipment is made. Does this restriction of public access relieve DOE from compliance with DOT regulations? Would the shipment have to move under a DOT exemption if full compliance could not be achieved?

Road D: The road is on DOE-owned property, maintained by DOE, and speed enforcement is by DOE contractor. The road is posted with a sign restricting usage to those on official government business only, however, there are no physical barriers. Is this considered a public highway by DOT? Does a temporary barrier change the status of the road? Does a permanent guard gate change the status of the road?

Additionally, we would like clarification for shipments that directly cross, but do not travel along a public highway. Does blocking the public highway while the shipment moves across the highway preclude compliance with DOT regulations?

As stated earlier, we are in the process of providing guidance to our operating contractors, so a prompt response to these questions is greatly appreciated. If you require clarification on any of the questions posed, please contact Ms. Dana Willaford at 301/353-7272 or FTS 233-7272.

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Susan H. Denny, Director
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